

DISTRICT OF ALABAMA

DENNESS R. ELLIS

Plaintiff,

-5-

CIVIL ACTION NO. #2:06CV00421-
DRB

DRB

LIBERTY MUTUAL FIRE
INS. et al.

Defendants.

**PLAINTIFF'S MOTION TO REMAND TO STATE COURT
AND MOTION FOR IMPOSITION OF ATTORNEYS' FEES
PURSUANT TO F.R.CIV.P. 11**

COMES NOW the Plaintiff in the above styled cause and moves this Honorable Court to remand this action to State Court pursuant to 28 U.S.C. §1447(c). The basis for the requested relief is that removal of this action to federal court is wrongful in that the Defendants failed to show that a complete diversity exists between the parties and failed to present evidence that the amount in controversy meets the jurisdictional limits of this Court. Thus, the removal was filed improvidently. In support of this motion, the Plaintiff shows

into the court as follows:

1. The current pending action is a car wreck case that involves allegations of negligence and/or wantonness and a claim for uninsured motorist benefits against Mary E. Austin (the at-fault driver) and Liberty Mutual (the plaintiff's insurance carrier).
2. The Defendant Liberty Mutual is a foreign entity and the Defendant Mary Austin is believed to be an Alabama resident. The accident report, attached hereto as Exhibit 1, has an Alabama address for Ms. Austin. While the Plaintiff is continuing to try to find her, the Defendant Liberty Mutual has not provided any information to the Plaintiff to

support its contention that complete diversity exists between the parties.

3. The Defendant Mary Austin is uninsured (See letter from Geico Insurance Company to Christina D. Crow dated December 29, 2005, attached hereto as Exhibit 2). As such, the only potential recovery in this case is the uninsured motorist coverage issued by Liberty Mutual. Attached hereto as Exhibit 3 is the declarations page for the insurance coverage issued by Liberty Mutual to the Plaintiff. As evidenced by Exhibit 3, the available uninsured motorist coverage is only \$60,000 (\$20,000 per person for three vehicles). Thus, even if Mary Austin is a resident of another state, the Defendant has not met their burden of proof for showing that the amount in controversy exceeds the jurisdictional amount of this Court.

4. Removal of an action is only proper if the United States District Court has original jurisdiction. 28 U.S.C. §1332(a) provides, in pertinent part:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

5. The Defendants have the burden of proving that federal jurisdiction exists. *Kirkland v. Midland Mortgage Co.*, 243 F. 3d 1277, 1281 n.5 (11th Cir. 2001), *Williams v. Best Buy Co.*, 269 F. 3d 1316 (11th Cir. 2001). Where, as here, the plaintiff has not pled a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional requirement. *Id.*; *Tapscott v. MS Dealer Serv. Corp.*, 77 F. 3d 1353, 1357 (11th Cir. 1996), *overruled on other grounds by Office Depot v. Cohen*, 204 F. 3d 1069 (11th Cir. 2000). The Defendants have offered no facts in their removal petition or consent to removal that would support their assertion that the amount in controversy exceeds the jurisdictional amount of this Court.

The Eleventh Circuit has reiterated that the burden of proving jurisdiction lies with the removing defendant.

We reiterate that the burden of proving jurisdiction lies with the removing defendant. A conclusory allegation in the notice of removal that the jurisdictional amount is satisfied, without setting forth the underlying facts supporting such an assertion, is insufficient to meet the defendant's burden. *See Laughlin v. Kmart Corp.*, 50 F. 3d 871, 873 (10th Cir. 1995); *Allen v. R & H Oil & Gas Co.*, 63 F. 3d 1326, 1335 (5th Cir. 1995); *Gaus v. Miles*, 980 F. 2d 564, 567 (9th Cir. 1992); *Burns v. Windsor Ins. Co.*, 31 F. 3d 1092, 1097 (11th Cir. 1994) (concluding that removing defendant did not meet burden of proving amount in controversy where it offered “nothing more than conclusory allegations”); *Gator v. Peninsular & Occidental S. S. Co.*, 287 F. 2d 252, 255 (5th Cir. 1961) (stating that removing defendant must make “affirmative showing . . . of all the requisite factors of diversity jurisdiction”).

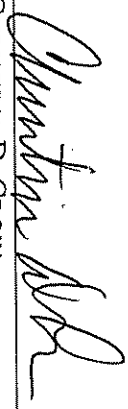
Williams v. Best Buy Co., id.

6. Even if Ms. Austin's residency is never determined, the Defendant has not met its burden of proving the “requisite factors of diversity jurisdiction” with their conclusory statement that “based on the pleadings, it seems likely that the total amount in controversy exceeds \$75,000.00 exclusive of interest and costs.” (Defendant's Notice of Removal, ¶9). No evidence has been presented to this Court that the amount in controversy exceeds the jurisdictional limit of this Court and, in fact, the only evidence that the Plaintiff has is that the uninsured motorist benefits that are available to her are \$60,000. Without such evidence, remand is the only appropriate action.

7. In addition, the Plaintiff is requesting that the Defendant Liberty Mutual be made to pay all attorneys' fees related to this removal and the filing of a motion to remand. There is no evidence that the at-fault driver is a foreign resident. She is listed as an Alabama resident on the accident report. (See accident report, exhibit 1). In addition, the Defendant

would be fully aware of the available coverage and the limits of that coverage, specifically \$60,000. Therefore, the Defendant Liberty Mutual knew or should have known prior to the filing of the Notice of Removal that the amount in controversy was less than the jurisdictional amount of the Court. Undersigned counsel for the Plaintiff has spent 4.5 hours in reviewing the Notice of Removal, doing research on these issues, and preparing this Motion to Remand. The Defendant should be made to pay for these costs.

WHEREFORE, based upon the pleadings in the case, Plaintiff requests that this case be immediately remanded to the Circuit Court of Bullock County, Alabama so that it may be timely tried.


CHRISTINA D. CROW
ATTORNEY FOR THE PLAINTIFF

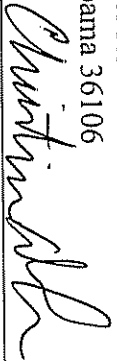
OF COUNSEL:

JINKS, DANIEL & CROW, L.L.C.
P. O. BOX 350
UNION SPRINGS, AL 36089
(334) 738-4225

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed, on this 5 day of June, 2006:

Joseph T. Carpenter, Esq.
Carpenter, Ingram & Mosholder, LLP
303 Sterling Center
4121 Carmichael Road
Montgomery, Alabama 36106


OF COUNSEL

SEATING		VICTIMS		NARRATIVE AND DIAGRAM		INVESTIGATION	
Other Involved Unit (Circle One) 10 12 Pedestrian 13 Rider of Domestic Animal 14 Out of View Motorized Vehicle 15 Victim of Other Circumstance/ Codes Not Applicable Other Involved Safety Equipment		Name Address 721 Taken By Date 3 1 C 35 F A A		Injury Type A. Visible or Evident Injury B. Bruise/Abuse/Smelling C. Not Visible - Not Pain/Not N. Non P. Police U. Unknown M. Minor		Name of Investigating Officer HANWELL B. JOHNSON Agency OR Agency ORI Date 07/28/05	
Unit 1 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100		Unit 2 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100		BASKIN STREET NOT SCALE BASKIN ST		Name of Investigating Officer HANWELL B. JOHNSON Agency OR Agency ORI Date 07/28/05	
ROADWAY ENVIRONMENT N/A 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100		NARRATIVE AND DIAGRAM 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100		INVESTIGATION Name of Investigating Officer HANWELL B. JOHNSON Agency OR Agency ORI Date 07/28/05			

GEICO

- Government Employees Insurance Company
- GEICO General Insurance Company
- GEICO Indemnity Company
- GEICO Casualty Company

Regional Office:
One GEICO Center ■ Macon, GA 31295-0001

12/29/05

Attorney Nathan Dickson for Denise Ellis
P.O. Box 350
Union Springs, AL 36089

CLAIM NO: 0274772800101027
RE: Mary E. Austin
LOSS DATE: 07/28/05

Dear Ms. Ellis:

With respect to the automobile accident occurring on 07/28/05, the GEICO Indemnity Insurance Company will not provide coverage to Mary E. Austin on the date of the above occurrence.

Sincerely,



Angel Griffin
Claims H453g
1-800-841-8842, x-1685





LibertyGuard Auto Policy Declarations
Liberty Mutual Fire Insurance Company
Boston, Massachusetts

YOUR POLICY NUMBER: AO2-251-474993-10 5 2
NAMED INSURED AND MAILING ADDRESS:
DENNESS R ELLIS
721 GROVE CIR
UNION SPRINGS AL 36089-1145

THESE DECLARATIONS EFFECTIVE: 07/20/05
FOR SERVICE PLEASE CONTACT:
2367 CENTRAL PARKWAY
MONTGOMERY AL 36106

1 CN000-204-689

SERVICE: 334-213-0651/800-850-4420
CLAIMS: 800-2CLAIMS (800-225-2467)
www.libertymutualinsurance.com

Policy Period: 07/20/05 to 07/20/06 12:01AM Standard Time at the Address of the Named Insured as Stated in the Policy.

Reason For This Notice: Your Renewal Policy Declarations

PERSONAL AUTOMOBILE COVERAGE, LIMITS, AND PREMIUM

Coverages And Limits Under Your Auto Policy:

Coverage Is Provided Where A
Premium Is Shown For The Coverage

Part			Veh 1			Veh 2			Veh 3		
1. Liability		\$	25,000	Each Person							
2. Liability		\$	50,000	Each Accident							
3. Liability		\$	25,000	Each Accident							
4. Property Damage		\$	1,000	Each Person							
5. Medical Payments		\$	22	16	18						
6. Uninsured Motorists		\$	62	62	62						
7. Liability		\$	20,000	Each Person							
8. Liability		\$	40,000	Each Accident							
9. Coverage For Damage To Your Auto											
Collision		\$		315							
Actual Cash Value Less Deductible Shown:											
Veh 2 \$ 500											
Other Than Collision		\$	73	143	32						
Actual Cash Value Less Deductible Shown:											
Veh 1 \$ 250											
Veh 2 \$ 500											
Veh 3 \$ 250											
Optional Coverage											
Rowing And Labor Cost - \$50 Each Disablement		\$	6	6	6						
Transportation Expenses		\$		16							
\$20 Per Day \$600 Per Accident											
Annual Premium Per Vehicle:		\$	360	755	279						
Total Annual Policy Premium:		\$	1394.00								

VEHICLES COVERED BY YOUR POLICY

Veh	Year	Make	Model	Vehicle ID Number
1	1991	BUICK	REGAL CU	2G4WB54L7M1420818
2	1996	NISSAN	MAXIMA	JN1CA21D3TT132926
3	1978	CHEVROLET		CCU148B169765



Dexter R. Long
SECRETARY

Edward F. Kelly
PRESIDENT

D. A. McFadyen
AUTHORIZED REPRESENTATIVE

LibertyGuard Auto Policy Declarations
Liberty Mutual Fire Insurance Company
Boston, Massachusetts

Page 2

YOUR POLICY NUMBER: AO2-251-474993-105 2

THESE DECLARATIONS EFFECTIVE: 07/20/05
(Continued from Previous Page)

Loss Payee:

VEH 2 MAX FCU

Month/Year Expires:
04/2007

Safe Driver Insurance Plan:

No Charges Apply-SC0

DRIVER INFORMATION

Driver Name
DENNESS R ELLIS
ROMMIE PERSONS

DOB State License Number
03/28/71 AL 6113687
12/05/73 AL 6029426

To Ensure Proper Coverage, Please Contact Us To Add Drivers Not Listed Above.

VEHICLE DISCOUNTS INCLUDED IN YOUR RATE

Discounts	Veh 1	Veh 2	Veh 3
Passive Restraint - Requires Med Pay	No	Yes	No
(Motorized Seat Belts and/or Air Bags)			

OTHER DISCOUNTS INCLUDED IN YOUR RATE

Multi-Car Preferred Auto Rating Plan (Preferred
Driver)

ENDORSEMENTS ATTACHED TO YOUR POLICY

2344	LMHC Membership
PP 04 84 12 89	Split Uninsured Motorists Limits - Alabama
SS2107-01 02	Uninsured Motorists Coverage - Alabama
UTO 3941	Amendment of Policy Definitions
PP 03 05 08 86	Loss Payable Clause
PP 03 03 04 86	Towing and Labor Cost Coverage
PP 03 09 04 86	Split Liability Limits
PP 03 26 06 94	Liability Coverage Exclusion
AS1046 12 89	Automatic Termination Endorsement
SS2061 05 96	Increased Limits Transportation Expenses Coverage
SS2112 10 99	New Vehicle Replacement Cost Coverage
PP 13 01 12 99	Coverage For Damage to Your Auto Exclusion Endorsement

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AUTO 3079 (Ed. 4-93)

Dexter B. L...
SECRETARY

Steven F. Kelly
PRESIDENT

W. A. McF...

AUTHORIZED REPRESENTATIVE

This policy, including all endorsements attached is countersigned by: